
UTAH LABOR COMMISSION

RICHARD MULVEY,

Petitioner,

vs.

**BRIGHTON ELECTRIC and WASATCH
CREST MUTUAL INS. CO; MOUNTAIN
MECHANICAL and TRUCK INSURANCE
EXCHANGE; DENSLEY ELECTRIC and
WORKERS COMPENSATION FUND,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISIONS**

Case No. 07-1036

Richard Mulvey asks the Utah Labor Commission to review two orders issued by Administrative Law Judge Holley. The first order denied Mr. Mulvey's request for appointment of a physician to provide medical evidence to support Mr. Mulvey's claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated. The second order dismissed Mr. Mulvey's claim for benefits for lack of supporting medical documentation.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND

On December 7, 2007, with the assistance of his attorney, Mr. Mulvey filed an Application For Hearing claiming workers' compensation benefits from various former employers and their insurance carriers for low back injuries allegedly caused by work accidents that occurred some 12 years earlier, in 1993, 1994 and 1995.

Mr. Mulvey's Application contained no medical documentation to support his claim for benefits. To overcome this lack of medical support, Mr. Mulvey asked Judge Holley to appoint a physician to examine him. Mr. Mulvey asserted that appointment of a physician was appropriate under the Labor Commission's Rule R602-2-2.C, because Mr. Mulvey's own treating physician "has failed and refused to give an impairment rating" and "due to [Mr. Mulvey's] lack of resources, a substantial injustice may occur" unless an examining physician was appointed. Mr. Mulvey also submitted a supporting affidavit stating that he has been unable to work since 1995, is living at a subsistence level, and has no savings or assets. The affidavit further stated that Mr. Mulvey's physician was unable to provide any medical support for Mr. Mulvey's claim because the physician had destroyed Mr. Mulvey's medical records in 2002.

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On January 4, 2008, Judge Holley denied Mr. Mulvey's request for appointment of a physician. Judge Holley concluded that Rule R602-2-2 allowed appointment of examining physicians only in those cases where the parties had submitted "conflicting" medical opinions. Judge Holley reasoned that, because there were no conflicting medical opinions in this case--in fact, no medical opinions at all--Rule R602-2-2 did not permit her to appoint a physician to examine Mr. Mulvey.

Mr. Mulvey then filed a request for Commission review of Judge Holley's order. However, this request review was not filed within the 30-day filing period established by the Utah Workers' Compensation Act and the Utah Administrative Procedures Act. On February 14, 2008, Judge Holley entered another order dismissing Mr. Mulvey's Application "without prejudice" for failure to submit supporting medical documentation. Mr. Mulvey then filed a timely request for Commission review of Judge Holley's order of dismissal.

DISCUSSION

As noted above, Mr. Mulvey's request for review of Judge Holley's initial order was untimely. Ordinarily, the Commission would have no jurisdiction to consider the merits of that request for review. However, Mr. Mulvey has raised the same issues and arguments in his request for review of Judge Holley's second order, which request is timely. Consequently, the Commission has jurisdiction to address Mr. Mulvey's arguments.

Section 34A-2-601 of the Utah Workers' Compensation Act grants ALJs discretion to obtain independent medical evaluations in disputed workers' compensation and occupational disease cases. The Commission's Rule R602-2-2 describes the circumstances in which ALJs should exercise this discretion. Paragraph A of Rule R602-2-2 authorizes appointment of a medical panel if the parties have submitted conflicting medical reports on a significant medical issue. As Judge Holley has already noted, in this case there are no "conflicting medical reports." Consequently, Judge Holley correctly concluded that paragraph A of Rule R602-2-2 does not serve as a basis for appointing a physician to examine Mr. Mulvey.

However, Mr. Mulvey argues that paragraph C of Rule R602-2-2 provides an alternative basis for appointment of an examining physician. Paragraph C provides:

The Administrative Law Judge may authorize an injured worker to be examined by another physician for the purpose of obtaining a further medical examination or evaluation pertaining to the medical issues involved, and to obtain a report addressing these medical issues in all cases where:

1. The treating physician has failed or refused to give an impairment rating, and/or
2. A substantial injustice may occur without such further evaluation.

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The Commission views paragraphs A and C of Rule R602-2-2 as applying to different situations. Subparagraph A applies when the parties have submitted medical opinions, but those opinions conflict. Paragraph C addresses two more unusual situations: 1) cases where a treating physician “fails or refuses” to provide an impairment rating; and 2) cases in which a “substantial injustice” may occur unless an examining physician is appointed. However, paragraph C provides is applicable only in exceptional cases. Otherwise the burden on the Commission’s medical advisory system could prevent the Commission from obtaining needed medical evaluations in other cases. Consequently, the question now before the Commission is whether Mr. Mulvey has shown that his circumstances warrant appointment of an examining physician pursuant to paragraph C of Rule R602-2-2.

In support of his request for appointment of an examining physician, Mr. Mulvey has submitted a short affidavit that contains conclusionary statements regarding his financial situation and his inability to obtain medical information from his own doctors. While Mr. Mulvey has explained that one of his physicians has destroyed the relevant medical records, Mr. Mulvey has not described any efforts to obtain medical information from other physicians, hospitals, insurance carriers or the Commission. Likewise, Mr. Mulvey has not explained his alleged lacks of financial means to obtain medical information to support his claim. Under these circumstances, the Commission finds that Mr. Mulvey has not established a sufficient basis for the Commission to exercise its discretion to appoint an examining physician.

ORDER

The Commission affirms Judge Holley’s order. It is so ordered.

Dated this 24th day of April, 2008.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.